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No. 74-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF SCOTT PAPER COMPANY AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
THE INTEREST OF SCOTT PAPER COMPANY AS *Amicus Curiae* IN THIS PROCEEDING	1
ARGUMENT	6
1. Failure of a Validation Study to Comply With Procedural Requirements of EEOC Guidelines Published After the Study Should Not Cause Rejection of the Study	7
2. The Absence of Written Job Analyses Should Not Necessarily Cause Rejection of a Validation Study	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

Bridgeport Guardians, Inc. v. *Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973)	5
Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973)	7
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	6, 7, 8
Kinsey v. *Legg, Mason & Co., Inc.*, 8 EPD ¶ 9767 (D.D.C. November 11, 1974)	7
Rogers v. *International Paper Co.*, 9 EPD ¶ 9865 (8th Cir. January 7, 1975)	10
United States v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973)	8
Watkins, et al., v. *Scott Paper Co.*, 6 EPD ¶ 8912 (S.D. Ala. August 27, 1973), on appeal, No. 74-1001 (5th Cir.	2, 5, 6, 10

STATUTES AND REGULATIONS:

29 C.F.R. Part 1607:	
§ 1607.1(a)	6
§ 1607.5	5
§ 1607.6	8

Page

35 Federal Register 12333 5

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

MISCELLANEOUS:

American Psychological Association, *Standards for Educational Tests* (1974) 8

C. Lawshe and M. Balma, PRINCIPLES OF PERSONNEL TESTING (2d ed. 1966) 9, 10

Educational Testing Service, "An Investigation of Sources of Bias in the Prediction of Job Performance, *A Six Year Study*" (June 22, 1972) ... 3

Northrup, THE NEGRO IN THE PAPER INDUSTRY (1969) .. 2

Wilson, *A Second Look at Griggs* v. *Duke Power Company; Ruminations on Job Testing, Discrimination and the Role of the Federal Courts,* 58 U. VA. L. REV. 844 (1972) 7

Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination; A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817 (1967) 7

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This brief of Scott Paper Company as *amicus curiae* is filed with the written consents of the parties, which have been filed with the Clerk. Rule 42(2).

THE INTEREST OF SCOTT PAPER COMPANY AS AMICUS CURIAE IN THIS PROCEEDING

Scott's interest in this case stems from the fact that some issues involved here concerning standardized employment tests are also involved, although on markedly

different facts, in a case against Scott, now pending in the Court of Appeals for the Fifth Circuit, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, *Watkins* v. *Scott Paper Co.*, 5th Cir., No. 74-1001.[1]

Scott is a substantial producer of pulp and paper at a number of mills located in various parts of the country. The *Watkins* case challenges various employee promotion practices employed at Scott's first mill in the South, located in Mobile, Alabama. The Mobile mill, built in 1940, was acquired by Scott in 1954. It had been manned in accordance with the traditional Southern practice of limiting blacks to lower paying, more menial jobs.

In late 1961, Scott announced that no job would be barred to any employee or applicant because of race. By 1968, over 300 of Scott's 500 black employees were in jobs historically reserved to whites. Scott's desegregation efforts led the Director of the Industrial Research Unit at the University of Pennsylvania to cite Scott in 1969 "as a leader in minority integration in the [paper] industry" and as having "justly acquired the reputation as *the* place to apply for work in the Negro community." Northrup, THE NEGRO IN THE PAPER INDUSTRY (1969), pp. 110, 111 (emphasis is Professor Northrup's).

In 1958, Scott was planning to open a new Tissue Mill in Mobile. This mill would double the work force and would also introduce machinery that was more ad-

[1] The facts stated herein are all contained in the record developed at trial, 6 EPD ¶ 8912 (S.D. Ala. August 27, 1973), on file in the Court of Appeals for the Fifth Circuit. Counsel for plaintiffs in *Watkins* include the same New York counsel who represent respondents here.

vanced, faster operating and more highly automated than the printing grade paper machines in use at the old mill. In manning a new Tissue Mill in Everett, Washington, a few years earlier, Scott had found that requiring all job applicants to take the Kopas test (and have a high school diploma or its equivalent) increased the likelihood that new employees could, after extensive and costly on-the-job training, learn to operate the new, complex, fast-moving machinery. Scott's Personnel Director at Mobile in 1958 had been at Everett at the earlier time, and when the new Mobile mill opened in 1958, the Kopas (and high school) requirement was instituted, though initially only for white applicants.

When Scott changed the historic racial practices it had inherited so that blacks were expected to move into all jobs, Scott began requiring blacks to meet the same requirements for hiring and promotion previously required only of whites.

The testing and educational requirements have also been utilized since 1958 to select among applicants for "helper" jobs in the Maintenance Department. Helpers progress almost inevitably to qualification as journeymen in particular crafts in two or more years. Although helpers' wage rates are at the same level as entry level production jobs, Maintenance jobs are much sought after, and the successful applicant usually has accumulated between seven and ten years of seniority in a production department.

Some years after Scott began using the Kopas test, psychologists began to consider the possible racially discriminatory impact of many commonly used employment tests. See, *e.g.*, Educational Testing Service, "An Investigation of Sources of Bias in the Prediction of Job Performance, *A Six Year Study*" (June 22,

1972), at p. 3.[2] As a result, the Office of Federal Contract Compliance (OFCC)[3] questioned the validity of the Kopas test. OFCC recommended that Scott use the Wonderlic test instead. OFCC advised that Wonderlic had been validated at International Paper Company's Mobile mill, right next to Scott's. Scott therefore dropped Kopas in favor of Wonderlic on July 1, 1968.

At the same time, Scott retained Dr. William E. Scott, Jr. (no relation), a qualified industrial psychologist with considerable knowledge of the paper industry. Dr. Scott was not to attempt validation of Wonderlic but to design a new testing program which would validly predict successful job performance at Scott.

Dr. Scott began by spending one week in a Scott mill closely observing worker performance to define the aptitudes required for the job. He then compared these perceived aptitudes and his previously acquired knowledge of the industry with data about available tests. On this basis Dr. Scott selected eight standardized tests and performed concurrent validation studies on these tests at Scott mills in Mobile and Detroit. As to four of the tests, evidence of validity was not strong and they were discarded. Dr. Scott determined that the other four—Bennett Mechanical, Purdue Non-Language, Perceptual Speed, and Closure Flexibility—had a significant relationship to job performance. He recommended that Scott use these tests to screen applicants for hiring in production departments and that it use the first three of the tests to screen applicants for Maintenance jobs.

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[2] This study concluded that the concept of "differential validity" was not supported by the data examined in the study, *id.* at 16.

[3] OFCC is the agency within the Department of Labor which has been given primary responsibility to oversee and enforce compliance with various Executive Orders relating to equal employment opportunity policies of government contractors.

Rather than relying solely upon his concurrent validation study, Dr. Scott recommended that relatively low cutoff scores be used for hiring into production jobs (slightly higher scores were recommended for Maintenance) in order to gather data for a predictive validation study.[4] The Company accepted Dr. Scott's recommendations (although it set the cutoff scores at even lower levels than those recommended by Dr. Scott), and data are now being analyzed for the predictive study.

These decisions were made in the late Summer and early Fall of 1970, and the new test battery was instituted in November of that year. On August 1, 1970, the Equal Employment Opportunity Commission (EEOC), which had prepared guidelines on testing in 1966, published a substantially different and expanded set of guidelines on testing in the Federal Register. 35 Fed. Reg. 12333.

Scott's hiring since the adoption of the new test battery includes approximately 40 percent blacks, whereas the available labor force contains 27.9 percent blacks.

After trial, the District Court in *Watkins* found the evidence insufficient to conclude that Scott's test battery, used as a Maintenance screening device, had a disproportionate racial impact.[5] The Court also found

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[4] A predictive validation study involves giving the test to job applicants but not using the scores as a screening device, and thereafter comparing the scores with job performance of those who have been hired. A concurrent validation study involves giving the test to present employees and then studying the comparison between the test scores and their performance on the job. 29 C.F.R. § 1607.5.

[5] Only seven blacks had taken the test battery for Maintenance, and the Court found this number too small to have statistical significance. *Cf.* Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1338-39 (2d Cir. 1973).

that Scott had carried its burden of establishing that the tests were valid predictors of successful performance in Maintenance jobs.[6]

ARGUMENT

As this summary shows, Scott's *Watkins* case involved a number of points that this Court may consider in deciding this case, although on a different factual record.

First, neither this case nor *Watkins* involves the hasty implementation of a testing program effective contemporaneously with Title VII (as was the case in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)). Scott shares with other employers a strong interest in the sound development of programs which will improve their employee selection procedures. Employers have a strong business purpose in utilizing only those tests which "pass" potentially good workers and "screen out" potentially poor workers. Tests and other sound tools of employee selection substitute objective criteria for subjective or irrational criteria (including race), and thus serve the interests of both employer and minority employee. See EEOC Guidelines, Section 1607.1 (a). Thus, testing is by no means a suspect practice under Title VII. See *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434 & nn. 10 & 11.

Second, both this case and *Watkins* involve the question whether compliance with every detail of the EEOC Guidelines is indispensable to finding that an employ-

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[6] The use of the tests to screen job applicants was not at issue in the trial because the plaintiff class did not include unsuccessful job applicants.

The District Court also found the high school requirement lawful, a finding not challenged by the plaintiffs on appeal.

er's validation study complies with Title VII. Thus, both cases raise issues about the reasonableness of the Guidelines and whether a requirement of strict compliance will, by imposing costly and artificial burdens, drive employers away from using tests, even if professionally developed and validated.[7]

For these reasons, Scott urges that this Court, in passing upon the contentions of the parties in this case, give consideration to the following points.

1. Failure of a Validation Study to Comply with Procedural Requirements of EEOC Guidelines Published After The Study Should Not Cause Rejection of The Study.

The EEOC Guidelines are unquestionably entitled to respect. See *Griggs* v. *Duke Power Co., supra.* On the other hand, the law is what Congress has written, and failure to follow the Guidelines in every particular should not render a validation study unacceptable. *Cf. Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973).

This must especially be true where the study was conducted before the Guidelines were published and where the discrepancy relates only to procedural, as distinguished from substantative, requirements of the Guidelines.[8] Any other result would automatically invalidate every study conducted before August 1, 1970, (and

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[7] For explorations of this problem, see Wilson, *A Second Look at Griggs* v. *Duke Power Company; Ruminations on Job Testing, Discrimination and the Role of the Federal Courts,* 58 U. VA. L. REV. 844, 873 (1972); Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination; A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817, 831-835 (1967).

[8] See Kinsey v. Legg, Mason & Co., Inc., 8 EPD ¶ 9767, at p. 6207 & n.4 (D.D.C. November 11, 1974).

thus long before *Griggs*) except those which fortuitously complied with procedural rules that were unknown and that could not reasonably be foreseen.[9] For example, the Guidelines (§ 1607.6) require that the *report* of a validation study contain certain elements that professional standards apparently do not require.[10] Certainly, a report to a client which satisfies professional standards, especially if it was made before issuance of the Guidelines, should not be rejected because it lacks non-substantive elements the Guidelines now require.[11]

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[9] It may be presumed that a substantial number of other companies like Scott had already conducted validation studies before the 1970 EEOC Guidelines were published.

[10] We note that the American Psychological Association's recently published *Standards for Educational Tests* (1974) states that *manuals* prepared for test users "should describe the duties of the workers as well as give their job titles." Point E3.1., at 33. The *Standards* label such description as "very desirable" (rather than "essential") but they do not appear to call for any similar requirement of written job analyses for an actual validation study. Requirements for manuals for test users are obviously different from requirements imposed on a testing expert actually conducting a validation study, and the omission of a requirement in the second case is therefore of significance here.

[11] Some requirements in the Guidelines may fall somewhere between the substantive and the procedural. Failure of a validation study (especially if performed before the Guidelines were published) to comply with such "grey area" requirements may pose a more serious problem. If the study is otherwise sound, the better course may be to permit the employer to continue utilizing the test subject to prompt correction of the deficiency. This is the approach followed in the Fifth Circuit when an employer learns that its validation study should have complied with a principle announced for the first time on appeal. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 917-18 (5th Cir. 1973).

2. The Absence of Written Job Analyses Should Not Necessarily Cause Rejection of a Validation Study.

Job analyses apparently serve three purposes in a validation study. Where those purposes are well served by other means, the absence of job analyses is not a substantive deficiency. Moreover, where job analyses *have* been performed but have not been reduced to writing, the study should not be rejected.

The first purpose of job analyses is to assist in the initial selection of tests to be validated. This purpose might be equally served, however, by having the testing expert carefully study the jobs and reach conclusions about the criteria for successful job performance (*e.g.*, observing a fast-moving line of finished products and quickly spotting those which are too large, off-color, etc.), thus obviating the use of job analyses. See C. Lawshe and M. Balma, PRINCIPLES OF PERSONNEL TESTING, at p. 23 (2d ed. 1966). If the expert chooses his tests incorrectly, the result is only a validation study that fails to show correlations between test scores and job performance; if the study does show the appropriate correlation, it is immaterial whether the tests were actually selected on the basis of job analyses. Thus, the absence of written job analyses has no Title VII impact.

The second purpose of job analyses in a concurrent validation study is to provide a basis for objectivity in rating worker performance so that comparisons of performance and test scores may be made. The ratings must distinguish the better performers from the less adequate performers. If the rater does not know how to measure performance levels, the comparisons will not accomplish their purpose. Alternate techniques, however, are commonly employed. One is the paired

comparison technique. Supervisors (who of course already have responsibility for assessing job performance) rate each worker *against each other worker,* and the results are processed by means of statistical techniques to produce ordinal rankings of all the workers.[12] Under such a procedure, the development of formal, written job analyses would not affect the rankings.[13]

The third purpose of job analyses is in comparing two jobs to determine whether they involve similar criteria. For example, there may be too few workers in a particular job to permit a validation study of that job, but if it employs criteria similar to those in a job for which a test has been properly validated, it may be permissible to utilize that test to screen applicants for both jobs.[14] But here again, written job analyses are not the only way to accomplish this comparison. The testing expert, for example, may have made job

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[12] If the worker group contains blacks and whites and a biased supervisor consistently rated blacks below whites, the statistical methods employed for examination of the data would cause this bias to be detected, and hence that supervisor's ratings would not be utilized. C. Lawshe and M. Balma, *op. cit. supra,* pp. 48-49.

[13] A court of appeals has reached a different conclusion. Rogers v. International Paper Co., 9 EPD ¶ 9865 (8th Cir. January 7, 1975).

[14] This issue is present in Scott's *Watkins* case. The validation study conducted by Dr. Scott in 1969 included giving the tests to 119 Maintenance journeymen in six different crafts at Scott's Mobile and Detroit mills. The test could not be validated against certain other craft jobs because there were too few incumbents willing to participate in the validation study. Dr. Scott had studied all of these craft jobs, however, and he concluded that the criteria being measured were applicable to all of the Maintenance craft jobs. Accordingly, he recommended that the same test battery be used to screen applicants for all of the jobs.

analyses but not reduced them to writing; or he may be familiar with the two jobs and able, without preparing written job analyses, to reach a professionally sound conclusion that no significant differences exist between them. In such a case, the absence of written analyses should not bar acceptance of the expert's conclusions.

And, as stated under Argument 1, *supra,* where the formal Guideline requirement of *written* job analyses was issued after the validation study was conducted, absence of written analyses provides even less of a basis for rejecting the study.

CONCLUSION

Scott respectfully urges the Court to consider the arguments made herein in its resolution of the issues in this case which involve validation of standardized employment tests.

Respectfully submitted,

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